Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RUKMINIE HARILALL,

Petitioner,

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP.,
formerly known as Bexar County Hospital District,
doing business as University Hospital System,
also known as University Hospital,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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6409

QUESTION PRESENTED

Our founding fathers of the Constitution of the United States, crafted the Constitution with the idea that all men are created equal and should be treated equally under the law, that all men are entitled to the freedom to pursue life, liberty and happiness. With this in mind, petitioner believes that, her case has merit and that her Petition for Writ of Certiorari would presented a substantial question and that there is good cause for the Supreme Court to grant her request for Writ of Certiorari, since her case poses serious question of gross violations of petitioner's basic human rights as well as her United States Constitutional Rights.

1. Was the Fifth Circuit Court of Appeals wrong in affirming the District Court's Grant of Summary Judgment in favor of defendant where a termination from employment on grounds of race, national origin and alien status in violation of Title VII of the Civil Rights Act of 1964 where evidence of mixed motives has been shown thereby creating issues of material fact?

2. Where there is a case posing serious violations of petitioner's basic rights causing her to loose her livelihood, is there justification to reverse the decision of the Fifth Circuit Court of Appeals?

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on February 18, 1999. The Court of Appeals denied a timely Petition for Rehearing En Banc on March 26, 1999, and a copy of the order denying rehearing en banc appears at App. F, 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C.A. § 2000e-2.

§ 2000e-2. Unlawful employment practices:

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

STATEMENT OF THE CASE

A. Course Of Proceedings And Hearings

(1) Following an on site investigation in November 1996, the EEOC issued a NOTICE OF SUIT RIGHTS to petitioner dated 12/20/96, which terminates the commission's processing of petitioner's charge.

(2) On March 20, 1997, a Civil Action law suit, Case No. SA-97-CA-347-FB, was filed.

(3) On March 20, 1998, Joe J. Harris, attorney for the Respondent Hospital filed a Motion for Summary Judgment.

(4) On June 21, 1998, Judge Samuel Fred Biery sent down an order granting Respondent Hospital's Motion for Summary Judgment.

(5) On July 9, 1998, petitioner filed her notice of appeal, timely appealing from the District Court order granting Respondent Hospital's Motion for Summary Judgment, as required by the U.S. District Court. Also a Motion for Appointment of Counsel on appeal was filed along with the notice of appeal.

(6) On August 21, 1998, petitioner filed her Brief and Record Excerpt.

(7) Respondent Hospital filed a Motion to strike certain parts of petitioner's Record Excerpt but, on October 1, 1998, the court incorrectly granted permission to strike the entire Record Excerpt instead of those parts of the record mentioned in Respondent's motion.

(8) On October 12, 1998, petitioner moved for reconsideration of the order dated October 1, 1998.

(9) On November 5, 1998, the court denied the motion granting permission to strike the entire Record Excerpt rather than the parts mentioned on Respondent's Motion.

(10) On November 10, 1998, petitioner moved for reconsideration of the court's order of November 5, 1998, the

order denying petitioner motion for reconsideration. This court denied the motion on December 17, 1998.

(11) On December 23, 1998, petitioner submitted a motion for reconsideration of the Court's order of December 17, 1998. This motion was returned without being filed.

(12) On December 30, 1998, petitioner submitted another motion for reconsideration of the Court's order of December 17, 1998. The Court refused to reconsider this motion.

(13) On February 18, 1999, the Court filed an order affirming the Summary judgment to The University Health System.

(14) On March 1, 1999, a Petition for Rehearing or Rehearing En Banc was filed by petitioner.

(15) Also on March 1, 1999, petitioner filed a motion asking the Court to appoint an attorney to represent her during the Rehearing En Banc.

(16) On March 12, 1999, a letter confirming a telephone conversation with the filing clerk, requesting that the Petition be filed as Rehearing En Banc instead of Rehearing, was filed. Also, in the letter petitioner requested that the court inform her in advance if, it will not appoint an attorney to represent her, so that, she can make arrangements to represent herself.

(17) On March 23, 1999, petitioner's Motion for Appointment of Counsel on Rehearing En Banc was denied.

(18) On March 26, 1999, petitioner's Motion for Rehearing En Banc was denied, without notifying petitioner that her motion for legal representation was denied, and once again she was not allowed to represent herself.

(19) On April 6,1999, a motion asking for STAY OF THE MANDATE was filed along with a motion asking for appointment of counsel to represent her during the Court's decision of STAY OF THE MANDATE.

(20) On April 21, 1999, both the motion asking for STAY OF THE MANDATE and motion asking for appointment of

counsel to represent petitioner was denied. Once again, petitioner was not informed that she was not allowed an attorney, and she was not allowed to represent herself.

(21) Currently, petitioner is filing a petition for WRIT OF CERTIORARI.

B. Details Of Events Leading To The Law Suit

Petitioner was formerly employed by Respondent Hospital as a Nurse. Petitioner alleges in a Civil Action Law Suit, Case No. SA-97-CA-347-1313, that during her employment at the University Hospital, she was subjected to harassment (i.e. intensely hostile atmosphere) and discrimination due to her race, color, religion, sex, national origin and disability status, that her employment was terminated, at least because of factors relating to her national origin and disability in violation of Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and The Americans with Disabilities Act.

Following an on site investigation by the EEOC in, November 1996, NOTICE OF SUIT RIGHTS was granted on 12/20/96 to petitioner.

The NOTICE OF SUIT RIGHTS read as follows:

> Title VII and/or The American with Disabilities Act: This is your NOTICE OF RIGHT TO SUE, which terminates the commission's processing of your charge. If you want to pursue Your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court, If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise, your right to sue is lost.

A civil Action law suit was filed in U.S. District Court on March 3, 1997.

Petitioner also alleges defamation of character due to the fact that Respondent Hospital published damaging information to GroupOne, a Publishing clearing house, citing that petitioner was discharged for violating hospital policy,

instead of the agreed upon settlement of resignation in lieu of termination. This posed tremendous amount of consternation and difficulty for petitioner in obtaining another *Hospital based job.*

In the Motion granting Summary Judgment to the Respondent Hospital, the Honorable Judge Samuel Fred Biery limited the motion for Summary Judgment to two (2) issues; the first he titled "harassment" and the second was characterized as "discriminatory discharge based upon National Origin." Petitioner plead allegations that she endured harassment and was discharged for reasons of race, color, religion, sex, disability status and national origin.

Also, that Respondent Hospital violated petitioner's right to a work environment free of harassment and that the Respondent hospital's administrators were aware of the harassment that occurred In their facility. The Respondent Hospital are liable for such acts of harassment The Hospital administrators knew of such acts or should have known of such acts by their employees since it occurred in their facility.

Petitioner claims discrimination based on national origin, as well as mixed motives and disability for reasons of discharge.

Petitioner claims she belongs to a protected class, and that her national origin is Indian. However, she would also like to inform the Court that herself, her parents and grandparents were all born and raised in Guyana, South America. Petitioner claims that she was subjected to harassment by her supervisor, Marlene Upright, fellow co-workers and doctor Craig Witz, partly because of her national Origin. Quoting from the Honorable Judge Samuel F. Biery's order, page 2, lines 3-13, the following:

> . . . Throughout the latter half of 1993 and the early part of 1994. Plaintiff claims she endured remarks about her national origin, her "alien" status or basis for citizenship, "quirks" and stereotypical generalizations about "foreigners" and persons descended from an ethnic Indian back ground. . . .

Also quoting from Honorable Biery's order, page 6, first paragraph the following:

> . . . During a break, Plaintiff was asked by Diana Hutson, Where do you come from. Who are you. Where did your son come from(?) . . . Diana then proceeded to ask the Plaintiff where she from and how did she get to this country. . . .

Assistant Head Nurse, Judy Rodriguez, a representative of management was present on this occasion and was a party in this interrogation, she did not intervene and she did not inform Diana Hutson that her behavior was inappropriate.

On one occasion, petitioner testified that she was called a "wetback" by Diana Hutson. Quoting from petitioner's deposition page 129, line 1-6, the following:

> . . . she asked me if I was a wetback. She also asked me if I knew what a wetback was. I was probably acting like real dumb, you know. It didn't phase me because I knew I wasn't a wetback. I came to America on PanAm air line, through New York. If they want to Know . . .

The fact that petitioner was born and raised in Guyana, South America, she maintains that being called a "wetback" does meet the criteria of harassment based upon national origin.

Petitioner maintains that management knew of the above incidents and chose to do nothing. Further, petitioner claims that she informed John Guest, CEO of the Hospital on November 18th, 1993, of the above stated incidents. Petitioner also maintains that, she informed Inez Calley, senior vice president and Nancy Ray, assistant vice president, of the above incidents during the meeting with them, the same day petitioner took the psychiatric evaluation that Inez Calley ordered to her. The psychiatric evaluation was presented to both Inez Calley and Nancy Ray.

Petitioner claims that, the harassment she endured at the hospital was based on an illegal basis (i.e. national origin, race,

color, disability status or religion) and that, the harassment materially affected a term, condition or privilege of employment.

Petitioner would like to emphasize that her former employer knew or should have known of the harassment and failed to take prompt remedial action.

Petitioner claims that, she was ill and was on sick leave when all writeups occurred. Petitioner was diagnosed with a broken neck. Also, please note as per the EEOC letter dated 11/27/96, it clearly stated that witnesses testified that petitioner "may have been on the verge of a breakdown which began to affect her work."

Petitioner claims that, she successfully reported incidents of harassment to management. Petitioner reported incidence of harassment to Nancy Ray, Inez Calley, John Guest and Marlene Upright at and around the time when she was asked to get a complete psychiatric evaluation. After obtaining the psychiatric evaluation, petitioner reported to Inez Calley's office and gave her the doctor's evaluation. At that time, petitioner explained to both Nancy Ray and Inez Calley of her experience in the nursery with Dee Benham, Ceal Heacox and Christina McCoy. Petitioner also informed them of what had occurred under Marlene Upright's supervision. Petitioner reported that, Dee Benham ordered Ceal Heacox and Christina McCoy not to allow petitioner a bathroom break to empty her bladder. (Refer to petitioner's deposition pages 134-137). Petitioner also informed Inez Calley and Nancy Ray of the harassment that she experienced in the Nursery as well as on the 4th floor, OB Ward, when she met with them. Petitioner explained to Inez Calley and Nancy Ray that she was under tremendous amount of stress and that she had been very nervous for the last five months because, Marlene Upright had placed a call to her parent's home and left a message on their recorder that petitioner's job was in jeopardy if she did not go into work. Petitioner explained that she has been in a state of panic since that call was made by Marlene Upright. Petitioner, in a meeting with Nancy Ray and Marlene Upright explained to Nancy Ray that she had been in a

state of panic for the last five months, wondering every day when she goes into work if today is the day Marlene Upright will fire her. Nancy Ray stated that, ". . . Rukminie, we are not going to fire Marlene you have to learn to work with her . . ." (Petitioner's deposition at 98, lines 17-18) Further, Nancy Ray said that, ". . . Marlene is not going to fire you and you have to learn to live with her and work with her" (Petitioner's deposition at 100, lines 4-6). Petitioner explained to Nancy Ray I was very nervous. They had gotten to the point where they hammered, hammered and I just couldn't handle it anymore and so I left. I went home. I felt better. In addition, petitioner testified that later that day ". . . I got a call from Marlene and she said that I cannot go back to work until I have a complete psychiatric evaluation. She said my job was in jeopardy. I couldn't handle it any longer. I was at home. I felt better away from that place." Petitioner's deposition at 89, lines 5-25 and at 89, lines 1-3. Once petitioner obtained the psychiatric evaluation, she reported to Inez Calley's office to give her the report. Petitioner stated:

> . . . but she had already gotten the report, I think, and then they start questioning about what had happened and then . . . Me, Marlene Upright and Nancy Ray met and then I told her what Marlene had done and that she had called and left that message on the recorder, and I come every day wondering if today is the day she is going to fire me . . .

Petitioner's deposition at 92, lines 2-17. Petitioner, further testified that when she met with Inez Calley and Nancy Ray and gave them the letter. . . . "They read it and looked at it and then I told her what had happened. You know, that Marlene had called and left a message and I was like in a panic for five months. . . ." (Petitioner's deposition at 93, line 5A 1). Petitioner also testified that while at work she was called a "wetback", "illegal alien". She endured remarks about her "alien" status or basis for citizenship, "quirks" and stereotypical generalizations

about "foreigner" and persons descended from an ethnic Indian background. . . . was criticized for having different cultural norms or background than co-workers, and her work product was heavily criticized and endured a higher level of scrutiny than her non-Indian co-workers. (Honorable Samuel Fred Biery's Order of June 21, 1998).

Petitioner resigned her position in the later part of March 1994. Soon after that Respondent Hospital issued a report to GroupOne Services Consumer Disclosure, a publishing clearing house stating that petitioner was discharged instead of the agreed upon settlement of resignation in lieu of termination. (Petitioner's deposition, at 117, lines 13-20). Marlene Upright in a deposition stated, "I am sure I got a Phone call from Diana Lewis to say that Rukminie was going to resign instead of having a discipline . . ." (Marlene Upright's deposition at 24, lines 14-21).

Petitioner was an exemplary employee of twelve years with an above average performance record, petitioner was never written up prior to this incident in January 1994. Marlene Upright in her deposition testified that petitioner performance was "very good". (Marlene Upright's deposition at 24, lines 14-21).

Also petitioner claimed that she met with John Guest on 11/18/93 the morning of the day that she was asked to get a complete psychiatric evaluation. During this meeting, petitioner reported the incidents of harassment that she was experiencing on the fourth floor, OB Ward, to John Guest and also informed him that she was going to file a report with the EEOC. In fact, in November 1993 when petitioner was asked to get a complete psychiatric evaluation she went to the EEOC and the following day and complained. At the EEOC, she spoke to Mary Esther Jimenez, the EEOC investigator assigned to her case and informed her that Marlene Upright informed her that she cannot return to work unless she had a complete psychiatric evaluation. While petitioner was still sitting in the office with Ms. Mary Esther Jimenez, she spoke to Ms. Mary Esther Jimenez, at length

regarding the harassment she was receiving at the hands of Marlene Upright, Judy Rodriguez, Diana Hutson and other nurses. Ms. Mary Esther Jimenez then placed a call and spoke to the head of Personnel and at that time she asked that particular individual, "if an employee told them she was pregnant if they were going to send her for a complete examination." Petitioner complied with Marlene Upright order and got a complete psychiatric evaluation.

Once petitioner returned to work the horror intensified. Now the harassment was done by Members of the Nursing Float Pool, co-workers, Nursing professors working with the Nursing float Pool, Staff doctors, management, employees of Protective Services and other non-nursing personnel. Petitioner in a desperate attempt to defend herself made a copy of a single page of a medical record to take to P.J. Arcienga, another employee who is charged with the duty of petitioner's defense, to prove to him that she was being harassed and get some help to stop the rain of terror which instead ended her employment with the Respondent Hospital but not the terror. The terror followed her from one employer to another and to the community at large.

In the Honorable Judge Samuel Fred Biery's Order granting Respondent Hospital's Motion for Summary Judgment, he stated that

> Both parties agree that in order to establish an actionable claim of harassment, petitioner must prove the following (1) she belongs to a protected class; (2) she was subject to harassment; (3) the harassment was based on race, national origin, color, or religion; (4) the harassment materially affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. (Jones v. Flagship Int'l,, 793 F.2d 714, 719-20 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987))

Petitioner feels that she successfully established and met all of the criteria listed above. In her deposition, petitioner graphically described incidences of harassment and hostility she encountered at her place of employment. Also, in the letter from the EEOC, it clearly stated that their findings confirmed petitioner's complaint of harassment and hostility. The harassment petitioner endured during her period of employment at the Respondent hospital was so severe that she became increasingly anxious, was shaking and might have been at a point of a nervous breakdown as a result of the hostility. On several occasions, petitioner successfully reported to top level management, her experience of hostility, ridicule and harassment while she was at work. Petitioner maintains that top level management knew or should have known of the harassment and chose not to do anything about it. Management chose to look the other way and allow the despicable behavior of their employees to continue.

Petitioner alleges that her basic constitutional right and her Civil Rights, guaranteed under Title VII of Civil Rights Act of 1964, was violated by the Respondent Hospital.

Petitioner also alleges that she was denied of the right, to a work environment free of harassment thus violating her right guaranteed under Title VII. The Respondent Hospital was breaking the law by denying her a work environment free of harassment.

Petitioner PRAYS that the Supreme Court of The United States will carefully review her charge of Civil Rights violation under Title VII and grant her Petition for Writ of Certiorari so that her basic human rights and her constitutional rights are restored to her. Also, and more importantly, allow the law of the land to be up held or enforced so that, we can continue to reap the fruits of freedom and the benefits of democracy that our founding fathers so carefully drafted and dreamed of, as they were writing the Constitution of the United States.

1. *Harassment Allegations*

Petitioner alleges that she was repeatedly harassed by members of management, fellow co-workers and support staff. The harassment was so intense that induced mental strain and pressure that affected petitioner's work performance. Quoting from the Honorable Judge Samuel Fred Biery' order dated June 21st, 1998, page 9, second paragraph, the following:

> In order to establish an actionable claim of Title VII Harassment, Plaintiff must prove that: (1) She belongs to a protected class; (2) She was subjected to harassment; (3) The harassment was based on an illegal basis (i.e. national origin, race, color, disability or religion); (4) The harassment materially affected a term, condition or privilege of employment; (5) The employer knew or should have known of the harassment and failed to take remedial action. Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986), 479 U.S. 1065 (1997).

Petitioner maintains that, she belongs to a *protected class;* that she was subjected to harassment; the harassment was based on an illegal basis (i.e. national origin, race, color, disability status or religion); that the harassment materially affected a term, condition or privilege of employment; and that her employer knew or should have known of the harassment and failed to take prompt remedial action. The Respondent Hospital knew of the harassment because management, on many occasions, were the ones doing the harassment.

Petitioner feels that the Respondent Hospital should be held liable for the actions of it's employees because management was made aware of the harassment on many instances. Quoting from the Honorable Judge Samuel Fred Biery's order, page 10, line 7-10 the following:

> An employer is held liable for harassment only "if it knew or should have known of the harassment and failed to take prompt remedial

action." *Sharp v. City of Houston*, 960 F. Supp. 1164, 1170 (S.D.Tex. 1997).

Please note, petitioner maintains that the Respondent Hospital management knew of harassment and chose to do nothing about it. An incident report was filed with Protective Services which clearly stated that "copy of this report will be delivered to persons concerned for disposition."

Petitioner claims that by "denying her a work environment free of such reprehensible behavior, the Respondent Hospital is in violation of Title VII if the Hospital (1) knew of the behavior or, (2) should have known of the behavior. Nash v. Electrospace Sys., 9 F.3d 401, 404 (5th Cir. 1993)." (Quoting from petitioner's former attorney, Oscar Cantu, opposition to motion for Summary Judgment). Petitioner maintains that the Defendant Hospital knew of the reprehensible behavior and chose not to do anything about it and is In violation of Title VII.

In a report dated April 24, 1990, a report of harassment, made to the Hospital Protective Services. The Reference Number on the report is 23 1. The report read as follows:

> The above complainant stated that she has received numerous phone calls of harassment nature to her home, also that property consisting of flowers and plants have been destroyed by unknown persons. Complainant also stated that while at work, she is experiencing acts or actions aimed at her with the design of harassment. The first part of this complainant has been referred to the SAPD under CASE NO. 90-201741, dated the 24th of April 1990.
>
> The second part of this report applies to our Medical Center Hospital as the harassment occurs within the confines of our Medical Center and while complainant is on duty. Complainant is very seared, as she feels the pressure placed upon her by fellow co-workers. She is reprimanded by co-workers who are not in a position to address her in regards to her

> actions or duties while at work. She is addressed in a very degrading manner, and what disturbs complainant is that she has not given cause, to no one to be treated in such a manner. All complainant desires is to be treated in a fair and impartial manner. The feelings produced by these employees, which she did not named to me, but can be to the proper, person (Supervisor). The nature of the remarks made, are not permissible, no where, much less in a place such as our's. The Medical Center Hospital.
>
> By been the recipient of these harassment, complainant feels that her duties is been affected.
>
> Complainant feels that her supervisor Benham is supportive of her.
>
> Copy of this report will be delivered to persons concerned for proper disposition.

In a letter from the EEOC, it clearly stated that their findings during an on site investigation revealed that the harassment did occur. The letter read as follows:

> This is to advise you that the commission will be making a determination soon in your charge of discrimination. Commission procedures require that I discuss the case with you prior to the issuance of the determination. As requested in your letter received in our office on November 20, 1996, this is a summary of the information in the file and fulfills the requirement to inform you.

The District Director will base his decision on documentation in the file. The documentation thus far reveals the following:

> You alleged that you were subjected to harassment by Clinical Nurse Director, Assistant Head Nurse, and other staff nurses, because of your national origin, Indian.

Bexar County Hospital denies discriminating against you. Bexar County a] so contends that you had performance problems for which you were to be discharged. Bexar County also contends that you were allowed to resign in lieu of discharge.

Information obtained during the investigation shows that other nurses ridiculed you regarding every aspect of life from your private sex life to being an alien. This is indeed a form of harassment. In order to discern whether the harassment was based on your national origin in violation of Title VII Witnesses identified by you and those whom we believed would be able to provide information of the daily operations that you were involved in were contacted. Information obtained from witnesses indicated that you are a highly skilled professional who may have been on the verge of a breakdown which began to affect your work. Information confirms that Marlene Uptight, Clinical Nurse Director, has yelled at you and made the statement that she did not want you working in her unit. Witnesses confirm that other nurses have make comments, asked personal questions, and made accusations in an effort to embarrass you. When questioned as to the motivation for this treatment witness responses range from cultural sensitivity (meaning because of the culture you were raised in you are more sensitive than other employees to the same treatment) to all LVN'S and nurses who transferred from the 6th floor has been on Marlene's hit list. Witness information and your statement of those who were harassed and discharged for (you believe) supporting you appears to support the latter contention. The nurses you indicated were harassed and discharged all worked on the 6th floor. The information obtained during the investigation does

not clearly indicate that your national origin was a factor in the actions and or decisions of Bexar County Hospital District or its representatives.

Documentation indicates you were written up on numerous occasions and you were to be discharged. Documentation also shows that you resigned your position. Documentation further shows that you grieved the write ups and discharge. You also appealed the final finding of the administrative Group. All information provided by you, your attorney, witnesses, and that provided by Bexar County Hospital District will be reviewed by the District Director in making his determination.

Should you wish to submit additional documentation to strengthen support for your allegations or to refute the contentions of Bexar County please submit this within five days of mailing of this letter. Please do not hesitate to call me at (210) 229-4841 if you have any questions.

The issuance of the determination may conclude the Commission's processing of the charge."

Upon the receipt of the above letter petitioner submitted a copy of the GroupOne consumer service report issued by the Hospital, a copy of the doctor's note regarding the status of petitioner's neck by Dr. Peter McGanity, a copy of the psychiatric report by Dr. Harold C. Domres, Jr., a copy of petitioner's most recent performance evaluations given to her by her supervisors, a copy of the report of harassment made to the Hospital Protective Services was submitted to the EEOC within five days of receiving the above notice. After reviewing all the evidence, the EEOC issued a NOTICE OF SUIT RIGHTS granting petitioner permission to sue within 90 days. The date on the order was 12/20/96. A civil Action Lawsuit was filed by petitioner on 03/20/97 in U.S. District Court.

2. *Mixed Motives Allegations*

Respondent Hospital motives for terminating petitioner's employment was partly based on illegal discriminatory practices. Oscar Cantu's response, opposition to Summary Judgment states the following:

> Plaintiff can establish a prima facie case of discriminatory discharge based on mixed motives. Plaintiff has competent, probative evidence evidence based on the EEOC findings that it is more likely than not that the employer's actions were based on illegal discriminatory criteria. Jatoi v. Hurst-Euless Bedford Hosp. Auth., 807 F.2d 1219 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988).

Petitioner feels that she supplied the Court with a preponderance of evidence to support the fact that the Respondent Hospital intentionally discriminated. Also, the fact that the EEOC had gone out to the Respondent Hospital and made an on site investigation and concluded that the harassment did occur and issued a Notice of Suit Rights is concrete evidence to support petitioner's charge. Oscar Cantu's response, opposition to motion for Summary Judgment further stated the following:

> The Plaintiff must prove by a preponderance of the evidence, both that the defendant's articulated reason is false and that the Defendant intentionally discriminated. (Walton v. Bisco Indus., 119 F.3d 368, 370 (5th Cir. 1997)). Also see St. Mary's Honor Ctr. v. Hicks, 509 U.S. 510-11, 113 S. Ct. 2742, 2748-49 (1993).

Petitioner feels that she has successfully shown that Respondent Hospital reasons for ending petitioner's employment was based on mixed motives and illegal discriminatory practices. Quoting from Oscar Cantu's response, opposition to motion for Summary Judgment, the following:

> Plaintiff can recover by showing that while a legal non-discriminatory reason has been articulated by the employer, a showing of illegal or "mixed motives" can then negate the articulated reason and allow the Plaintiff to recover. (See Price Waterhouse vs. Hopkins, 490 U.S. 228, 267 (1989)). Furthermore, disputes as to the employer's motives or state of mind raise factual issues thereby precluding summary Judgment. (See McFarland vs. Cassady (9th Cir. 1986) 779 F2d 1426; Delgado vs. Lockheed - Georgia Co., (11th Cir. 1987) 815 F.2d 641, 644; Clemons v. Dougherty Co. (11th Cir. 1982) 648 F2d 1365.)

In addition, petitioner feels that, the fact that another employee confessed to making copies of medical record and she was not reprimanded or counselled for her actions also proved that the Respondent Hospital's reason for discharging petitioner was illegal or the hosptial had mixed motives. Further, her Constitutional right of equal treatment under the law, and her right to the freedom to pursue, life, and happiness was violated.

Petitioner was written up and terminated while she was on sick leave. Records indicated that petitioner had an on the job injury on 01/22/94. Petitioner was on sick leave from 01/23/94 to 02/04/94. Dr. Peter McGanity informed petitioner that she had a broken neck. Petitioner was ill, stressed out and very anxious due to harassment from her supervisors, co-workers and Attending Physicians, as the findings of the EEOC will indicate. (Petitioner has the doctor's note and the EEOC report in her possession if needed by the Court).

On 01/22/94 the record indicated that Dr. C. Witz reported petitioner to Marlene Upright for not calling him with lab results. That same day Marlene Upright followed petitioner into Room 422-1 and wanted to know what "CLD" meant. In addition to being harassed by Dr. Craig Witz, Marlene Upright, and other nurses, petitioner suffered an on the job injury by pulling a

post-op patient up in bed and into a sitting position and holding her up in a sitting position while an OB/GYN doctor listen to her lungs.

Please note: A doctor's evaluation is true and correct up to the time it was done. Once the individual leaves the doctor's office it could change, the individual condition could improve or worsen. In fact, once petitioner had returned to work following the psychiatric evaluation, she experienced an even more hostile work environment, and as the letter dated 11/27/96 from the EEOC indicated, the hostility was so intense that petitioner was at the "verge of a nervous breakdown and that it was starting to affect her performance." Petitioner felt she needed to be removed from that intensely hostile environment, but Nancy Ray refused to do so, informing petitioner that she "have to learn to work with Marlene." In fact, in petitioner's case, exposure to an intensely hostile environment over an extensive period of time, changed her psychological condition. Petitioner's condition worsened. She became increasingly anxious and distraught. (Petitioner has the EEOC letter in her possession if needed by the Court).

Petitioner resigned her position after an administrative appeal in March of 1994. In June of 1994, the Hospital issued a report to GroupOne, a Consumer Information Disclosure service agency, indicating that petitioner was discharged, instead of the agreed upon settlement, resignation in lieu of termination. (Petitioner has a copy of the GroupOne publishing clearing house report in her possession if needed by the Court).

The fact that, the Respondent hospital published such damaging information about petitioner's employment at their facility produced tremendous amount of consternation and difficulty for petitioner in getting employment in another hospital. (Petitioner has a copy of the letter to Santa Rosa Health System written by Mr. Michael Latimer, petitioner's former attorney, requesting information as to why employment was denied by the Santa Rosa Health Care System, in her possession if needed by the Court).

Dr. McGanity sent a report to Protective Services on March 7, 1994, giving the Respondent Hospital an update of the condition of petitioner's neck, and recommended continued follow up. (Petitioner has a copy of the report by Dr. Peter McGanity in her possession if needed by the Court).

Petitioner was a long time exemplary employee with an above average performance record. In an evaluation done on 04/26/84 by Oleta Chavacci RN, petitioner was given a score of 88. Another evaluation done on 07/15/91 by Ester Perez RN, petitioner was given a score of 90. In another evaluation done on 05/14/92 by Martha Rodriguez, petitioner was given a score of 90. Lastly, the most recent evaluation done by Marlene Upright on 06/02/93, petitioner received a score of 94. (Plaintiff has a copy of the above listed work performance evaluations in her possession if needed by the Court).

A copy of the incident of harassment that was made to the Protective Services of the Hospital in April 1990, a copy of the GroupOne Consumer Disclosure report made by the Hospital in June 1994, a copy of the up date of the condition of petitioner's neck, a copy of the psychiatric evaluation by Dr. Domres, and a letter explaining what occurred while petitioner was working at the Hospital, and a copy of petitioner's most recent work performance reports by her supervisors were provided to the EEOC. The EEOC used the above listed documents in considering petitioner's charge.

The EEOC also made an on site investigation as requested by petitioner. The EEOC used the information it gathered during it's investigation and the above listed information that was provided to them in determining the status of petitioner's charge which resulted in the EEOC, handing down a NOTICE OF SUIT RIGHTS.

Date of NOTICE OF SUIT RIGHTS was 12/20/96. Exactly 90 days later, on 03/20/97 a lawsuit was filed in U.S. District Court.

Petitioner's employment was allegedly terminated for copying a single page of medical record. As per the Employee

Handbook given to petitioner for her guidance, the only place in that Handbook that address mis-handling of medical records and/or releasing confidential information without the approval of the immediate Supervisor is addressed, is under Group B Violations. NOTE: Group B violations carry a penalty of "two days suspension without pay for first offense." Petitioner was given the maximum penalty, a Group A. Violations that are criminal in nature fall under Group A. Copying a single page of medical record to take to another employee, who is charged with the duty of petitioner's defense, is not a criminal activity. Besides, Mr. P.J. Arcienega did not look at, or read the piece of paper that petitioner handed to him. The patient's confidentiality was not breached. Also, petitioner claims that Respondent Hospital was holding her responsible for a Policy, which she was never made aware of, and that she was given a Handbook which she used as a guide to perform her duties at the Hospital. Petitioner claims that, this incident was the first violation she had ever received during her twelve (12) years of employment by the Respondent hospital. Petitioner was never written up before this incident. Petitioner's performance reports indicated that her work performance was exemplary, she was given above average scores by her supervisors. (Petitioner has Employee Handbook and her work performance report in her possession if needed by the Court).

Petitioner claims that on many occasions, she observed other employees make copies of medical records without the consent of their immediate supervisor.

Petitioner claims that on many occasions while she was working at the hospital, medical students would take the entire patient's chart out of the building to the medical school library, and sometimes kept them all day, doing their charting. Those charts were taken out of the building without the consent of a supervisor or the patients as the Respondent Hospital claims that the charts are the property of the Hospital District and should not be taken out of the building without the approval of a supervisor or the patients.

Petitioner claims that the portion of the chart with the doctors' orders are on triplicate paper. The original stays in the chart, the yellow copy is placed in the "Kardex" and is then tossed out in the trash cans when it is no longer needed without shredding, also the pink copy is for the nurse's use. The yellow and pink copies are easy to read. On many occasions, accidentally or intentionally, the pink copies are taken out of the hospital and to the nurses' home in their pockets. NO ONE knows for certain that the pink or the yellow copies of the doctors' orders are not copied, read, or find themselves in the hands of unauthorized persons and that the patient's confidentially are maintained.

In Honorable Biery's order granting Respondent Hospital's Motion for Summary Judgment, he wrote "Petitioner was fired for removing a copy of patient's record from the hospital which is against district policy."

Petitioner maintains that she did not remove a copy of patient's record from the Hospital. Petitioner took a copy of a single page to the Employee Representative, housed in the same building, to prove that she was wrongfully accused by Marlene Upright of not following Dr. Craig Witz's order. The Employee Representative's office is in the same building, on the 11th floor of the main Hospital building.

Petitioner maintains that, if a District Policy ever existed during her employment with the Hospital, she was never made aware of it.

Petitioner maintains that on several occasions the entire chart was missing for hours. After hours had passed, the medical students would return the chart. The medical students would take the charts to the medical school's library to do their charting. This had occurred on several occasions with charts of patients that petitioner was caring for. The Respondent hospital does not know for sure that, the medical records did not fall in the hands of unauthorized persons or that parts of the charts were not copied and that the patient's right to confidentiality was not violated.

Petitioner maintains that, some part of the medical records are on triplicate paper and that many nurses would place copies of doctor's order in their pockets and carry them around with them so that they can refer to them as they care for their patients. Many times those copies are taken out of the Hospital because the nurses accidentally or intentionally forgot to dispose of those copies prior to leaving the hospital. Also, many of the copies of the doctor's order are placed in the trash cans at the Hospital and are then disposed of by the housekeepers. Those copies are legible and can be read by anyone with little or no medical background, thus violating the patient's confidentiality. It is not the Respondent hospital practice to have all waste paper with confidential patient information shredded prior to disposing of it in the trash cans, and as a result, patient confidentiality are not protected. No one knows for certain that someone has not gone through the trash cans and read those copies of patient's medical record thus violating the patients' confidentiality. Moreover, no one knows for sure, that the copies of patient's medical records that were intentionally or accidentally taken out of the hospital in the nurses' pocket were not read by unauthorized persons and that patients' right to confidentiality were not violated.

Petitioner has successfully established a *prima facie* case of discriminatory discharge. The fact that she had an exemplary work performance record and that the basis for her was copying a single page of medical record to take to another employee, housed in the same building, and is charged with the duty of her defense was not a good justification to terminate an employee of twelve (12) years. The penalty was too harsh and does not fit the violation. As stated in the Respondent's Handbook, page 34, "releasing confidential information without approval of immediate Supervisor" falls under Group B violations which carry a penalty of two (2) days suspension without pay. During the appeal process with the Respondent Hospital, Nancy Ray used a so called District Policy, which petitioner maintains that she never knew existed and was never

made aware of during her entire twelve years of employment with the Respondent Hospital. In addition, another individual, the secretary, also made copies of the medical record without her immediate supervisor's permission and was not even counseled or reprimanded for her actions.

Petitioner proved that she successfully reported the incidents of harassment to management. Petitioner met with John Guest (CEO) on November 18, 1993. During that meeting she reported to Mr. John Guest that she was being called a "wetback" and was told that she was an illegal alien in this country and that she does not belong here and that they are going to prove it." She was told that she was gay among other things. Petitioner reported incidents of harassment to Ms. Nancy Ray, Ms. Inez Calley, the Respondent Hospital Protective Services, Ms. Marlene Upright, and Mr. P. J. Arcineiga.

Petitioner believes that her employment was terminated in retaliation for filing a complaint with the EEOC. On November 18, 1993, after petitioner spoke with John Guest, she informed him that she was going to file a complaint with the EEOC. Petitioner left the Hospital because she was very stressed and anxious and was unable to perform her duties due to the tremendous amount of pressure and the harassment she was experiencing. Later that day, petitioner received a telephone call from Marlene Upright at her home. Marlene Upright informed her that she could not return to work unless she had a complete psychiatric evaluation. Petitioner complied. Once petitioner was cleared by the psychiatrist to return to work she experienced an even more hostile and unbearable work environment. As a result of this, petitioner maintains that her termination was a pretext to mask discrimination and by denying her of "a work environment free of such reprehensible behavior, the Respondent Hospital is in violation of Title VII, since the Hospital's management (1) knew of the behavior or, (2) should have known of behavior. *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993)."

Moreover, petitioner maintains that the activity for which her employment was terminated, occurs every day and to a greater degree by other employees and medical students. The other employees and medical students were not counselled nor reprimanded by the Respondent Hospital. The Hospital management allowed the same activity for which petitioner employment was terminated for to go unnoticed every day. Also nurses, doctors, medical students and other members of the hospital medical team carry around sensitive patient information on their clip boards or in their pockets for reference all day, no one knows for sure that those information was not taken out of the building accidentally or intentionally and find themselves in the hands of unauthorized persons.

Petitioner resigned her position following a lengthy and unfruitful appeal process offered by the Respondent hospital in March 1994. She was followed by hospital personnel to her new place of employment. Petitioner was employed by a Home Health Agency, PULSE HOME HEALTH CARE, soon problems started there too. Dee Benham had one of her employee's, Anthia Murray RN, followed her to PULSE HOME HEALTH CARE. While she was there, she applied for a hospital based job with South West General Hospital and was denied a position. Petitioner also applied for a position at Santa Rosa Health Care System for a job without success. Santa Rosa Health Care System informed petitioner, that she was denied a position at their facility due the information published by the University Health System to a Consumer disclosure agency called GroupOne. Petitioner's attorney at that time, Mr. Michael Latimer, in a letter dated July 13, 1994, to Santa Rosa Health System inquired about the reasons by which petitioner was denied a position. The letter read as follows:

> This firm represents Rukminie Harilall who recently applied for a position with Santa Rosa. I am submitting this letter to you pursuant to Texas law regarding request by applicant for the reasons by which they were denied a position.

Ms. Harilall applied for a position at the hospital and was notified by a letter from you dated June 14, 1994, that she was not selected for the position. I sent you a letter dated June 29, 1994, requesting information regarding the position for which she applied, whether the position was filled and the reasons why Ms. Harilall was not selected for the position. I further requested that you provide me any communications that have been received by Santa Rosa Health Care, its agents and employees from any former employer of Ms. Harilall and the nature of those communications. I have not received any response from you.

I have been provided with a letter of July 5, 1994, sent to Ms. Harilall which does not provide the information that I requested previously. I would like to address this letter here, information contained in a consumer report. Ms. Harilall has submitted a disclosure request to the consumer reporting agency and will receive such information. In your letter of July 5, 1994, you indicated that the decision not to employ Ms. Harilall has made in part upon facts which she furnished to you. I am additionally requesting, on her behalf, for you to identify the facts upon which you denied her application for employment in part.

I am not requesting herein information contained in a consumer report. Ms. Harilall has submitted a disclosure request to the consumer reporting agency and will receive such information. My client wishes to know the answers to my inquiries submitted in my letter of June 29th and for you to identify the facts upon which you denied her application for employment, in part as you state.

If you have any questions regarding this request, please feel free to contact me.

Petitioner was defamed by the actions of the Respondent Hospital. The Management of the Hospital published false and damaging information about petitioner's employment record. As a result, petitioner was unable to find a hospital based job. She was able to gain employment in Home Health Nursing as a field nurse only.

REASONS FOR GRANTING THE WRIT

Petitioner strongly feels that her case poses serious concerns of gross violations of basic human rights as well as Federal Constitutional Rights, and if considered by the Court, has the ingredients necessary to set a precedent that will affect in one way or another the livelihood of all working Americans and set the standard of the work environment.

Petitioner's case was not given the necessary attention it deserved by the District Court, allowing for a fair trial.

Petitioner contends that the Honorable Judge Carolyn D. King had a personal vested interest in the outcome of the case. This conflict of interest clouded the Honorable Judge Carolyn D. King's judgment and thus affected her ability to make a fair and impartial decision and preside over this case.

Petitioner feels that she was not allowed the right to legal representation or the chance to represent herself, and that this was a violation of her Constitutional Rights.

Petitioner further claims that her basic Constitutional Right of equal treatment under the law was violated because another individual at the Respondent Hospital, the secretary, also confessed to copying documents and was not given the same treatment by the Respondent Hospital as was petitioner.

Petitioner humbly comes before this Court, The Supreme Court of the United States, to express her cry for help in this sad and tragic situation. A tragedy that in one way or another touches the lives of every working American. It crosses every walk of life, every member of the American workforce. It affects the mere fabric our society. This madness has no boundaries. It undermines the true meaning of democracy. This crisis, in one

way or another will have severe impact and far reaching effects on the Constitutional rights of Americans, their basic rights as human beings, and their freedom to pursue life, liberty and happiness.

Petitioner experienced terror, humiliation and public ridicule at the hands of the very people that we charge with the duty to save lives. The individuals, who by history, our ancestor, Florence Nightingale, painted with the image of kind, caring, gentle, loving, enjoys caring for the weak, feeble and needy. In fact Marlene Upright, Judy Rodriguez, Ceal Heacox, and Dee Benham all from management level were sighted on many instances performing acts of harassment. Petitioner's deposition has details of many disturbing and tragic revelations of acts of harassment performed by the above mentioned members of the Respondent Hospital. A report made to the Protective Services of the Respondent Hospital dated April 4, 1990, described in detail the gruesome behavior, the terror and the acts of harassment that petitioner experienced.

These acts of horror was occurring as part of the Respondent Hospital official policy states the following:

> . . . Our objective and policy is to provide equal employment opportunities to all employees and applicants without regard to race, national origin, sex, age, religion, disability or veteran status. . . .
>
> . . . Our supervisors and managers are responsible for assuring that our equal employment opportunity policy is followed on every occasion. . . .
>
> . . . Our commitment to providing equal employment opportunities includes an obligation to provide working conditions an working environment [with] promote growth, development, advancement and recognition a work environment which must be free of racial, ethnic, religious, disability, age and/or sexual harassment or

intimidation. Bexar County Hospital will not tolerate any form of racial, ethnic, religious, disability, age or sexual harassment (e.g. slurs and other comments, gestures or physical conduct). . . .

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RUKMINIE HARILLAL
Petitioner, Pro Se
4702 Hollyridge
San Antonio, TX 78228
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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED FEBRUARY 18, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50652
Summary Calendar

RUKMINIE HARILALL,

Plaintiff-Appellant,

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP, formerly known as Bexar County Hospital District, doing business as University Hospital System, also known as University Hospital,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-97-CV-347)

Before KING, Chief Judge, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-appellant Rukminie Harilall appeals the district court's award of summary judgment to defendant-appellee

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

University Health System Development Corp. in this suit alleging violations of Title VII, 42 U.S.C. 2000e to 2000e-17. We affirm.

I. BACKGROUND

Plaintiff-appellant Rukminie Harilall was employed by defendant-appellee University Health System Development Corp. (UHSDC) as a nurse. Harilall's complaint alleges that during her tenure with UHSDC she was harassed on the basis of her race, color, religion, and national origin, and that UHSDC ultimately terminated her for discriminatory reasons.[1] Harilall filed suit in the district court on March 20, 1997. On June 21, 1998, the district court granted UHSDC's summary judgment motion, dismissing Harilall's claims on the grounds that the conduct complained of did not rise to the level of actionable harassment, that the evidence did not demonstrate that UHSDC management had actual or constructive knowledge of the harassment, and that Harilall's subjective belief that her discharge was the result of discrimination was insufficient to overcome UHSDC's

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1. Harilall's pro se appellate brief also argues that she was harassed and terminated on the basis of disability, and that UHSDC defamed her after she left UHSDC's employment by reporting to a publishing clearing house that Harilall had been discharged for violating hospital policy when, in fact, she resigned in lieu of termination. Neither allegation appears in her complaint. We therefore will not consider these allegations on appeal. We further note that, although Harilall contends in her appellate brief that she was not terminated, but resigned in lieu of termination, this distinction is irrelevant for purposes of determining whether her employment ended for discriminatory reasons.

evidence that she had been discharged for a non-discriminatory reason. Harilall timely appealed and appears before this court pro se.[2]

The summary judgment evidence before the district court established the following incidents of alleged harassment:

On one occasion, Harilall's supervisor, Marlene Upright, the Clinical Nursing Director heading the unit where Harilall worked, asked Harilall to work beyond her shift. Harilall replied that she could not because she had to pick up her son and had a class to attend. Harilall did not work beyond her shift and was not disciplined for her refusal.

Approximately two days to one week later, Upright left a message on the answering machine at Harilall's mother's house stating that Harilall was needed at work and that, if she did not report, her job would be in jeopardy. Harilall claims that other nurses had had more time off than she but were not called into work. Harilall went into work as

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2. Harilall's district court counsel no longer represents her. She now moves for appointment of counsel for purposes of this appeal. We deny her motion. There is no automatic right to the appointment of counsel in a civil case, and Harilall has not shown that the appointment of counsel is warranted here. *See Salmon v. Corpus Christi Indep. Sch. Dist.*, 911 F.2d 1165, 1166 (5th Cir. 1990) (no automatic right to the appointment of counsel); *Gonzalez v. Carlin*, 907 F.2d 573, 580 (5th Cir. 1990) (factors relevant to whether district court should appoint counsel in Title VII case include (1) merits of claim; (2) efforts taken by plaintiff to secure counsel; and (3) plaintiff's financial resources); *Neal v. IAM Local Lodge 2386*, 722 F.2d 247, 250 (5th Cir. 1984) (same).

requested. Upright then informed Harilall that she wanted to see Harilall in her office. Harilall stated that she became nervous at this request. In Upright's office, Upright explained that had she not made the phone call, Harilall would not have come to work. Harilall then told Upright that her father and mother had both experienced chest pains upon hearing the message. Harilall contends that Upright yelled at her during this discussion.

On another occasion, Harilall asked Judy Rodriguez, the assistant head nurse, for time off. Harilall had gotten someone to cover for her, but Rodriguez wanted to use the person elsewhere. After being pressed, Rodriguez stated that she would have to clear the time off with Upright. Harilall eventually received the requested time off, but believes that her request was granted only because she inquired about the Equal Employment Opportunity Commission.

The next incident occurred at the nurses' station, where Rodriguez asked Harilall who she was married to and how many times she had been married. Harilall stated that she felt that the questions were inappropriate, but admitted that she walked away without saying anything.

The next incident occurred during a break when a co-worker asked Harilall where she and her son came from. Harilall responded that she had fallen out of a tree because she felt it was none of the co-worker's business. The co-worker responded by asking Harilall if she wanted to get married to anyone. After responding in the negative, the co-worker informed Harilall that her husband could introduce Harilall to a "big, fat black man." Another co-worker then

asked Harilall where she came from and Harilall again responded by stating that she had fallen out of a tree. The co-worker stated that she believed Harilall was an illegal alien and was going to prove it. Harilall contends that during the incident her co-workers were all laughing. Although Rodriguez was present during the incident, Harilall informed neither Rodriguez, nor her the co-workers, that she felt that the questions were inappropriate. Harilall never reported the incident to Upright or anyone else in management.

Another co-worker subsequently questioned Harilall about her marital status and about her son's father. Yet another co-worker asked Harilall if she had had a "butt uplift." Harilall felt that these questions were inappropriate, but did not tell her co-workers, and never reported the incidents to management.

On a separate occasion, a co-worker asked Harilall if she is a "wetback," and if she knew what the term meant. Harilall never reported the incident to management.

Harilall also testified that she felt harassed when she was asked to provide orientation for a new employee. Harilall felt that she did not have the experience to provide orientation because she was the least senior employee in the unit. The new employee followed Harilall around each day, and, at the end of the day, Upright would ask the employee if she "ha[d] anything for [Upright]." Harilall believed that "she was like spying on me to see if I was doing my work right or something. I felt that at that moment that they were looking for something to fire me."

Harilall stated that she became a nervous wreck because of the above events. On another occasion, she arrived at work and was informed that she had failed to follow the doctor's orders on one of her patients and that Upright wanted to see her. Harilall stated that she felt very nervous and was crying and shaking. She stated that she felt like she needed to talk to someone and went home. That afternoon, Harilall received a call from Upright who told her that she could not return to work until she had a complete psychiatric evaluation. Plaintiff complied. Upon returning to work, she brought with her a letter from the psychiatrist, which she delivered to Inez Kelly, the head of all nurses. The letter stated that the psychiatrist thought that Harilall had a personality conflict with Upright. After delivering the letter, Harilall informed Kelly of the earlier incident in which Upright had left a telephone message on her mother's answering machine stating that her job would be in jeopardy if she did not come into work. She informed Kelly how upset she had been by the message. Kelly responded by setting up a meeting with Harilall, Upright, and Nancy Ray, the vice-president of Patient Care Services.

During the meeting, Harilall explained her side of the story and her feelings about the incident. Upright explained that the hospital was understaffed and that she had been desperate for help. Ray tried to convince Harilall to learn to work with Upright. Harilall described what Ray told her as follows:

> [Upright] is not going to fire you. She said, and you have to learn to live with her and you work with her and we are not going to fire [Upright]

> and she was going to have periodic meetings and I felt like I didn't need that periodic meetings because everybody on the floor was harassing me and I needed to be removed from that situation, but I didn't say anything because I had already told Inez Kelly that, that I had decided with my psychiatrist, I had come to a conclusion that if this continue[d] that I was going to resign . . . .

After the meeting, Harilall returned to work. Harilall felt that Upright was "hammering at [her]" because Upright asked her a question. Later that day, Upright informed Harilall that a doctor had called stating that Harilall had not called him with a lab result. Harilall felt she was being set up and decided to prove she was being harassed. She decided to make a copy of the patient's record to show she was being set up. She called the secretary and asked her to make a copy of the chart which she intended to take to an employee representative. After picking up the copy, she decided it was wrong and threw it away. However, she ended up making a second copy and taking it to the employee representative who wadded it up and told Harilall that she was not supposed to copy patients' records. UHSDC contends that Harilall was terminated for removing a copy of the patient's record from the hospital in violation of hospital policy.

II. STANDARD OF REVIEW

This court reviews the district court's grant of UHSDC's summary judgment motion de novo, applying the same standard as the district court. *See LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 447 (5th Cir. 1996); *Lavespere v. Niagara*

Mach. & Tool Works, Inc., 910 F.2d 167, 177 (5th Cir. 1990). If there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *See* Fed. R. Civ. P. 56(c); *LaPierre*, 86 F.3d at 447. Our review is "confined to an examination of materials before the lower court at the time the ruling was made."[3] *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988).

III. DISCUSSION

In order to prove that she was subjected to actionable harassment, Harilall must demonstrate (1) that she belongs to a protected class; (2) that she was subject to unwelcome harassment; (3) that the harassment was based on an illegal

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3. Appellant's record excerpts contained materials that were not submitted to the district court. Appellee filed a motion to strike the record excerpts. This court granted the motion to strike the appellant's record excerpts on October 1, 1998. On October 12, 1998, appellant moved for reconsideration of the October 1st order. This court denied the motion for reconsideration on November 5, 1998. On November 10, 1998, appellant moved for reconsideration of the court's November 5th order denying her motion for reconsideration. This court denied the motion on December 17, 1998. Appellant submitted a motion for reconsideration, received on December 23, 1998, asking for reconsideration of the December 17th order. This motion was returned to her without being filed. Appellant has now submitted yet another motion for reconsideration which was received on December 30, 1998. We refuse to consider the motion. Materials not presented to the district court are not properly before us and may not be introduced into the record on appeal. *See Fields v. City of South Houston*, 922 F.2d 1183, 1188 (5th Cir. 1991) (citing *John v. Louisiana*, 757 F.2d 698, 710 (5th Cir. 1985)).

basis, i.e., her national origin, race, color, or religion; (4) that the harassment materially affected a term, condition, or privilege of employment, i.e., that the harassment was sufficiently pervasive to alter the conditions of employment and create an abusive working environment; and (5) that the employer knew or should have known of the harassment but failed to take prompt remedial action. *See Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986); *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 236-243 (5th Cir. 1971); *Ochoa v. Texas Metal Trades Council*, 989 F. Supp. 828, 831 (S.D. Tex. 1997).

The district court properly granted summary judgment because Harilall's evidence does not satisfy the elements of actionable harassment. Of the incidents recounted by Harilall, the vast majority are common workplace occurrences, and Harilall has not established they were based on her national origin, race, color, or religion. While "wetback" and "illegal alien" are comments related to Harilall's national origin, these isolated remarks do not constitute pervasive harassment actionable under Title VII. The " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' does not affect the terms[,] conditions, or privileges of employment to a sufficiently significant degree to violate Title VII." *Jones*, 793 F.2d at 720 (quoting *Rogers*, 454 F.2d at 238); *see Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998) (" '[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' ") (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1003 (1998)) (citation omitted).

Moreover, Harilall has not presented evidence that UHSDC knew or should have known of the alleged harassment but failed to take prompt remedial action. Harilall admitted to the district court that she did not report the vast majority of incidents to management.[4] While, in the meeting set up by Kelly with Harilall, Upright, and Ray, Harilall did express her distress at the phone message asking her to come into work left by Upright on Harilall's mother's answering machine, this did not provide UHSDC with notice that Harilall felt that she was being harassed on the basis of her national origin, race, color, or religion. UHSDC, therefore, did not have actual notice of her claims of harassment. *See Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (actual notice established by evidence of complaints to higher management).[5] Nor was the harassment sufficiently pervasive to provide constructive notice. *See id.* (constructive notice shown where pervasive harassment exists that gives rise to inference of knowledge or constructive knowledge). The district court correctly granted summary judgment to UHSDC as to Harilall's claim of harassment on the basis of her national origin, race, color, or religion.

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4. In her pro se appellate brief, Harilall contends that she did report the incidents to John Guest, CEO of the hospital. There is no evidence in the record to support this assertion.

5. Rodriguez's presence during one incident in which Harilall was referred to as an "illegal alien" and questioned as to where she came from does not demonstrate that UHSDC had actual knowledge of pervasive harassment being directed against Harilall on account of her national origin, race, color, or religion.

Appendix A

As to Harilall's claim that she was terminated for discriminatory reasons, Harilall must first establish a prima facie case of discrimination. If she does so, UHSDC must articulate a legitimate, non-discriminatory reason for her termination. Once UHSDC has met its burden, Harilall must prove, by a preponderance of the evidence, that UHSDC's articulated reason is false and that the defendant intentionally discriminated against her. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11. (1993) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-55 (1981)); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing burden-shifting framework).

To establish a prima facie case of discriminatory discharge under Title VII, the employee must demonstrate (1) that she is a member of a protected class; (2) that she was discharged; (3) that she was qualified for the position from which she was discharged; and (4) that she was replaced by a member of an unprotected class. *See Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 318 (5th Cir. 1997). Assuming arguendo that Harilall has established a prima facie case of discriminatory discharge, the district court nevertheless properly granted summary judgment to UHSDC because UHSDC articulated a legitimate, non-discriminatory reason for Harilall's discharge — that she removed a copy of a patient's record in violation of hospital policy — and Harilall failed to meet her burden of demonstrating that this reason was pretextual and that UHSDC intentionally discriminated against her. Harilall's conclusory allegations are insufficient to rebut UHSDC's articulated non-discriminatory reason for her discharge. As the district court noted, "[i]t is more than

well-settled that an employee's subjective belief that [s]he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason." *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415, 1430 (5th Cir. 1996). The district court, therefore, properly granted summary judgment to UHSDC.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL DATED AND FILED APRIL 21, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50652

RUKMINIE HARILALL

Plaintiff – Appellant

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP, formerly known as Bexar County Hospital District, doing business as University Hospital System, also known as University Hospital

Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

ORDER:

IT IS ORDERED that appellant's motion for appointment of counsel to represent her during the court's decision of the stay of the mandate is denied.

s/ Carolyn Dineen King
Carolyn Dineen King
CHIEF JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION OF APPELLANT FOR STAY DATED AND FILED APRIL 21, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50652

RUKMINIE HARILALL

Plaintiff – Appellant

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP, formerly known as Bexar County Hospital District, doing business as University Hospital System, also known as University Hospital

Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

ORDER:

(X) The motion of appellant for

(X) stay . . . of the issuance of the mandate pending petition for writ of certiorari is DENIED.

* * *

s/ Carolyn Dineen King
Carolyn Dineen King
CHIEF JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING APPELLANT'S MOTION FOR RECONSIDERATION DATED AND FILED NOVEMBER 5, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50652

RUKMINIE HARILALL

Plaintiff – Appellant

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP, formerly known as Bexar County Hospital District, doing business as University Hospital System, also known as University Hospital

Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

Before HIGGINBOTHAM, JONES and DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel has previously granted appellee's motion to strike appellant's record excerpts. After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's motion for reconsideration is denied

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JUNE 21, 1998 AND FILED JUNE 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-97-CA-347-FB

RUKMINIE HARILALL,

Plaintiff,

vs.

BEXAR COUNTY HOSPITAL DISTRICT d/b/a UNIVERSITY HEALTH SYSTEM a/k/a UNIVERSITY HOSPITAL,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court has considered defendant's motion for summary judgment filed March 18, 1998, and plaintiff's opposition thereto. Defendant claims: (1) the conduct complained of does not rise to the level of harassment actionable under Title VII, (2) plaintiff never reported the incidents at issue to management, (3) plaintiff failed to

produce sufficient evidence to establish a prima facie case of discriminatory discharge, and (4) plaintiff has failed to present evidence to establish the stated reason for her termination was a pretext to mask discrimination. Plaintiff admits she never successfully reported the incidents to management but contends that on more than one occasion, management was present or was the party humiliating her. Plaintiff acknowledges the majority of incidents cited by the defendant are "remarkably free of any taint of illegal motive," but that assessment is true only if there is no substantive knowledge of the workplace environment, the plaintiff's work history, and the treatment plaintiff received from her supervisor, assistant supervisor and co-workers.

I. FACTS

According to the first amended complaint, plaintiff, a R.N., was employed by the defendant and under the direct supervision of Marlene Upright. Throughout the latter half of 1993 and the early part of 1994, plaintiff claims she endured remarks about her national origin, her "alien" status or basis for citizenship, "quirks" and stereotypical generalizations about "foreigners" and persons descended from an ethnic Indian background. Plaintiff maintains she endured disparaging remarks about her personal life including her sexual activities, interests or "sex life" in general, her manner of speech, and personal habits, was criticized for having different cultural norms or background than her co-workers, and her work product was heavily criticized and endured a higher level of scrutiny than her non-Indian co-workers despite plaintiff receiving excellent employment reviews. Plaintiff claims her allegations meet

the prima facie test for discrimination because she is person covered by Title VII and has been the victim of intentional discrimination and harassment due to her race, color, religion and national origin.

II. MOTION FOR SUMMARY JUDGMENT

"A party against whom a claim, counterclaim or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." FED. R. CIV. P. 56(b). Summary judgment shall be rendered if the pleadings and evidence show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). An adverse party may not rest upon the mere allegations or denials of its pleadings, but its response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial; if it does not so respond, summary judgment, if appropriate, shall be entered against it.

III. HARASSMENT ALLEGATIONS

In the motion for summary judgment, defendant claims the majority of incidents cited by the plaintiff are not

harassment at all but merely common workplace occurrences. In her deposition, plaintiff discussed the incidents she considered identified harassment.

The first incident occurred when plaintiff was coming back from lunch one day and Ms. Upright stopped her and wanted her to work beyond her shift. Plaintiff responded she could not stay because she had to pick up her son and also had to go to an in-service which she had paid for. Plaintiff did not stay over her shift and was not disciplined as a result of her actions but believes this incident prompted the second incident.

The second incident occurred a couple of days or possibly a week after the first incident. Plaintiff had worked continuously for seven days, the floor was hectic and the floor was full. Not only had plaintiff been working seven straight days, she was also attending classes at UTSA. Plaintiff was off on the eighth day and a phone call was placed to her mother's house and a message left on the answering machine that if plaintiff did not come in to work, her job was in jeopardy. Plaintiff testified her father, who has heart problems, began having chest pains and her mother who is stressed out from taking care of him, also began having chest pains. Plaintiff stated she went to work and while she was working, Marlene Upright came in and told plaintiff she wanted to see her in her office. Plaintiff maintained she became nervous, and when she went to Ms. Upright's office, Ms. Upright told her that if she had not made that phone call, plaintiff would not have come in to work. Plaintiff explained to Ms. Upright her parents' reaction to which she responded she did not cause her father to have

a stroke. Plaintiff stated Ms. Upright was yelling at her and there was a housekeeper right outside the door who overheard everything because the door was open. Plaintiff claims two other nurses and an assistant head nurse had been off for a longer time and no one called them, instead she was called.

Plaintiff also recalls asking Judy Rodriguez, the assistant head nurse, for some days off. Although plaintiff got someone to cover for her, Judy said that person could be used somewhere else. Finally, when backed into a corner, Judy told the plaintiff she would have to clear it with Marlene. Plaintiff finally got the time off but believes she got the time because she inquired about the EEOC. Plaintiff explained:

> And yeah. I finally got it off but not until and oh, somebody had told me that something about EEOC and this is how I got it off . . . . One of my old buddy on the sixth floor had mentioned something about the EEOC. I remember when I had gone down to the personnel office I had seen this big flyer, you know, on the wall . . . and I remember seeing a number there but I never was, you know, into that. So I never knew what it was.
>
> They told me to go into this office over there and they will give me the number [for the EEOC] and there was a secretary sitting over there. She said, "I have the number. I will give it to you. Is there a problem," and I said, "No. There is not a problem. I have a question," and that's all. There is no problem, and there was a lady sitting in the

> corner office. I couldn't see her and I think it was Ms. Owens. I am not sure, but it was somebody in a office in the corner and she said, "I just paged Marlene Upright," and me, I didn't know what the EEOC was about. All I knew that I asked for the number. I told the lady I didn't have a problem and I heard her say, "I just paged Marlene," and I didn't think anything of it. So I walked out and I went and left and I went home.
>
> So the next day I came to work and Marlene came down the hall real fast and she says, Anything you want, Rukminie, anything you want, you want to go to the class and you want to go to this place or you want to go to that place, and that's how I got that day off because all of a sudden I was getting everything I wanted. You know, and then I said wow, just go asking for the EEOC number. This is what I am getting, everything.

The next incident plaintiff mentioned was when Judy Rodriguez asked her, while they and others were standing at the nurse's station, how many times plaintiff had been married, who she was, and who plaintiff had been married to. Plaintiff stated she felt Ms. Rodriguez was prying, but plaintiff just walked away and did not say anything even though plaintiff thought these questions were inappropriate. Plaintiff reported the people standing around were laughing.

During a break, plaintiff was asked by Diana Hudson, "Where do you come from. Who are you. Where did your son come from[?]" Plaintiff responded she "fell off from a

tree." Diana then asked the plaintiff if she wanted to get married, and when plaintiff responded in the negative, Diana said to her, "My husband has a big, fat black man and I can introduce you to him." Diana then proceeded to ask the plaintiff where she was from and how did she get to this country. Plaintiff responded she fell from a tree and explained that everyone at break was "laughing and carrying on just like terrorizing me for my 15 minutes of break." However, plaintiff never complained to Marlene Upright nor told Judy Rodriguez or Diana Hudson, who were present during break, she thought their behavior was inappropriate.

Plaintiff was again questioned about her marital status and about her son's father by another nurse, Gail Powell. Plaintiff answered the question but never reported the incident or told Ms. Powell the questions were inappropriate. Another nurse asked plaintiff whether she had had a "butt uplift." Both of there incidents occurred outside the presence of other employees.

Plaintiff testified she felt harassed when she was told to orientate a quality assurance nurse hired to work part time. Because she was the least senior person, plaintiff felt she had the least experience in "ob" to orient the nurse. The nurse followed plaintiff's every step, and Marlene Upright would come up every afternoon and ask the nurse "do you have anything for me." Plaintiff stated she was "just assuming that she was like spying on me to see if I was doing my work right or something. I felt that at that moment that they were looking for something to fire me."

Plaintiff testified because of the above events she became a nervous wreck. She came in one day already nervous and

was told by another nurse that plaintiff had failed to follow the doctor's orders on one of her patients and Marlene was going to talk to plaintiff in the office when she arrived. Plaintiff states she was very nervous, crying, and shaking and said she needed to talk to someone. Plaintiff claims she had gotten "to a point where they had hammered, hammered and I just couldn't handle it anymore and so I left. I went home. I felt better." In the afternoon, plaintiff received a call from Marlene and was told she could not return to work until she had a complete psychiatric evaluation. Plaintiff complied. Thereafter, plaintiff took the letter from the psychiatrist and delivered it to Inez Kelly, the head of all the nurses. Plaintiff informed Ms. Kelly of the previous incident where Marlene had called her home and left a message on her recorder, and plaintiff had been in a panic for five months wondering if "today was the day [Marlene] was going to fire me." Ms. Kelly responded by setting up a meeting with plaintiff and Marlene.

At the meeting, plaintiff told her side of the story and Marlene told hers. Marlene stated she was very short staffed and pressed for nurses and needed someone to work so she called the plaintiff. Plaintiff described what Nancy Ray told her as follows:

> Marlene is not going to fire you. She said, and you have to learn to live with her and you work with her and we are not going to fire Marlene and she was going to have periodic meetings and I felt like I didn't need that periodic meetings because everybody on the floor was harassing me and I needed to be removed from that situation,

> but I didn't say anything because I had already told Inez Kelly that, that I had decided with my psychiatrist, I had come to a conclusion that if this continue that I was going to resign and Nancy Ray told me.
>
> This is what kept me there. Nancy Ray said to me, Rukminie, you have put in 12 years at this University Hospital and you have all these benefits, sick leave, vacation time. You have accrued so much. Why leave all of that and go somewhere else . . . So I was thinking, well, Nancy is on my side. She can't fire me and so I went through the hearing and stuff like that. I thought, well, I have a chance.

Following the meeting, plaintiff returned to work. What followed was an incident where Marlene came into a patient's room where plaintiff was working and asked the plaintiff what the term "CLD" meant to which plaintiff responded "clear liquid diet." Plaintiff stated Marlene left and she continued doing her work but plaintiff felt she was "hammering at me." Later that day as plaintiff was returning from lunch, Marlene stopped her and told plaintiff Dr. Witz called and said the plaintiff did not call him with the lab result. Plaintiff felt she was being set up and decided that she was going to prove she was being harassed. Plaintiff stated she decided to make a copy of the patient's record to show she was being set up and that is what she was fired for.

Plaintiff explained after being accused of not calling the doctor she went home and thereafter thought she should make

a copy of the chart and take it to the employee representative. Plaintiff called the secretary and asked her to make a copy of the chart. Plaintiff went to pick up the copy, but on the way out decided she should not have done that and threw the copy away. Plaintiff went back a second time and made a copy so she could prove her point to the employee representative. The representative wadded up the copy and told the plaintiff she was not supposed to make a copy of a patient's record. Plaintiff was fired for removing a copy of a patient's record from the hospital which is against district policy.

Both parties agree that in order to establish an actionable claim of harassment, plaintiff must prove the following: (1) she belongs to a protected class; (2) she was subject to harassment; (3) the harassment was based on race, national origin, color, or religion; (4) the harassment materially affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). The parties disagree as to whether the conduct complained of was harassment and whether the employer knew or should have known of the harassment and failed to take prompt remedial action.

Plaintiff contends that because Judy Rodriguez, an assistant head nurse and plaintiff's direct supervisor, was present on at least one of the incidents, her knowledge must be imputed to the defendant. Although Ms. Rodriguez did not have the authority to discharge, discipline, transfer, promote or grant plaintiff a pay raise, she was a part of

management or at a minimum, management's representative and a witness to behavior specifically condemned by Title VII and the defendant's own policy. In addition, plaintiff imputes knowledge to the defendant via the letter from the examining psychiatrist to Ms. Calley, one of the defendant's vice presidents.[1]

An employer is held liable for harassment only "if it knew or should have known of the harassment and failed to take prompt remedial action." *Sharp v. City of Houston*, 960 F. Supp. 1164, 1170 (S.D. Tex. 1997). Actual notice can be

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1. The letter was written at the request of the plaintiff to convey the results of her full psychiatric evaluation. The letter provided the following:

> There is no psychiatric diagnosis warranted other than adult adjustment disorder with physical complaints. Precipitants appear related to personality conflicts between Ms. Harilall and her nurse manager. Ms. Harilall has personality characteristics of a perfectionistic nature that eventuates in self induced high performance standards for herself professionally, and with a highly super-critical super-ego that reacts to her perception of non-approval by self or others with internalized stress to which she reacts psychosomatically.
>
> I trust that through your good offices, management strategy will be employed to resolve the present conflict so that a valuable human resource asset, i.e. Ms. Harilall, will be retained in your system and her professional potential will be maximized by your facilities's cultural values mission.

shown by proving the employee complained to higher management. *Id.* Constructive notice can be proved by "showing the pervasiveness of the harassment which gives rise to the inference of knowledge or constructive knowledge." *Id.* at 1171 (quoting *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393, 401 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997)). Plaintiff cites to only one occurrence, the break room incident, which "took place in public or under the eye of co-workers or supervisors." *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993). Based on that one event, plaintiff has not established constructive notice. In addition, once the letter was received from the psychiatrist, defendant responded by holding a meeting between plaintiff and Ms. Upright to work out their "personality" conflicts. The letter did not advise the defendant of plaintiff's feelings of harassment.

From a review of plaintiff's deposition, this Court does not doubt Ms. Harilall felt she was being "picked on." However, not every "insult, slight, or unpleasantness gives rise to a valid Title VII claim." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3rd Cir. 1997); *see DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir.) (Title VII cannot remedy every tasteless joke or groundless rumor confronting women in the workplace), *cert. denied*, 516 U.S. 974 (1995). Nor is Title VII to be expanded into a general civility code. *Oncale v. Sundower Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998). Moreover, it is "well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof

showing an adequate non-discriminatory reason." *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1421 (5th Cir. 1996). Defendant contends plaintiff was discharged for the unauthorized removal of a patient's records in violation of hospital policy, an infraction plaintiff does not dispute.

IV. CONCLUSION

The Court has considered defendant's motion for summary judgment, plaintiff's response, and the pleadings on file. The Court finds there is no genuine issue of material fact and defendant's motion should be granted.

Accordingly, it is hereby ORDERED that defendant's Motion for Summary Judgment is GRANTED and plaintiffs' claims against the defendant are dismissed.

ORDERED, SIGNED and ENTERED this 21st day of June, 1998.

s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 26, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50652

RUKMINIE HARILALL

Plaintiff – Appellant

v.

UNIVERSITY HEALTH SYSTEM DEVELOPMENT CORP, formerly known as Bexar County Hospital District, doing business as University Hospital System, also known as University Hospital

Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING EN BANC
(Opinion 2/18/99, 5 Cir., __, __ F.3d __)

Before KING, Chief Judge, BARKSDALE and STEWART, Circuit Judges.

Appendix F

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
Chief Judge